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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

PAUL W. PANCZKO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Paul Panczko, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit, entered on September 28, 1966.

JUDGMENT AND OPINION OF THE COURT BELOW

The United States Court of Appeals for the Seventh Circuit affirmed a judgment of conviction entered in the United States District Court for the Northern District of Illinois, Eastern Division, sentencing Petitioner to imprisonment for a term of fifteen years. No opinion was rendered by the District Court. The Opinion of the Court of Appeals has not yet been reported, but is reprinted herewith as Appendix A.

JURISDICTIONAL STATEMENT

On a jury trial, Petitioner was convicted of conspiracy to pass counterfeit currency in violation of Section 371, Title 18 U.S. Code, and of the transfer of such currency in violation of Section 473, Title 18, U.S. Code.

On appeal to the Seventh Circuit Court of Appeals, the judgment of conviction was affirmed by an opinion filed September 28, 1966.

A petition for rehearing was timely filed, and was denied on October 19, 1966.

The jurisdiction of this Court is invoked under the provisions of Title 18, U.S. Code, Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. In terms of the federal conspiracy statute, is a conspiracy a group or is it an act?

Stated otherwise, the statute denounces the act of conspiracy. May a court then treat a "conspiracy" as though the term described the people who work together towards a proscribed objective?

2. If A, B, and C conspire to pass counterfeit currency; and if C, possessing the counterfeit money, abandons the conspiracy and, in derogation of the conspiratorial objective, gives away the counterfeit currency, part to D and to E, each of whom never learns of the existence of the other nor of the existence of A and B, and each of whom uses the counterfeit money for his own private ends, then,

Do such facts constitute D and E as co-conspirators with A and B?

3. With the sole exception of the statute of limitations, is there any restriction on the right of the government to delay the bringing of an accusation, or the advising of a prospective defendant that he may be required to defend himself against an accusation?

What degree of delay will be permitted where the government offers no justification for that delay?

Where a defendant claims that his defense has been impeded by delay, what showing is he required to make, and is he even permitted to make any showing, in support of that contention?

4. If more than one person is involved in the commission of an offense, is there any restriction on the right of the government to add a conspiracy count to a charge of substantive violation?

5. Is there any circumstance under which the addition of a conspiracy count to a substantive charge is deemed abusive and unjust?

6. What showing is required to be made by a defendant who claims that a conspiracy charge was joined to a substantive count as a mere evidentiary technique?

7. Where a conspiracy charge is so pleaded as effectively to disguise the nature of the accusation against a defendant, has that defendant been deprived of the right to know the nature and cause of the accusation against him?

8. Where a crime has allegedly been committed and completed many years previously and where all other persons involved have long since been imprisoned, and where the acts of a subsequently implicated defendant are claimed to have consisted in the commission of a substantive offense, then,

May an indictment naming only that one defendant, properly charge a conspiracy?

9. Where the only overt acts pleaded by an indictment are acts performed in forming a conspiracy and acts thereafter performed by persons not members of the conspiracy, does that indictment state an offense under the conspiracy statute?

10. What degree of variance between pleading and proof in a criminal conspiracy case is rendered permissible by the legal principle that not all allegations of a conspiracy indictment need be proved?

11. Where the only witnesses incriminating a federal criminal defendant are a husband and wife who themselves admit participation in the offense, may they properly testify to private conversations with each other on the theory that such conversations are competent as admissions by co-conspirators in the course of the conspiracy?

12. Where the same act is deemed to constitute both the commission of a substantive offense and the joining of a conspiracy, may a conspiracy penalty be imposed cumulative to the maximum penalty to the substantive violation?

13. Where the opinion of a Court of Appeals recites that it has discussed every contention made by an appellant, and where in fact that appellant's principal contention has not been mentioned in the opinion, then has that appellant been denied due process at the appellate level?

14. Where a defendant is not advised that he is under suspicion for more than four years after his allegedly wrongful act, and for more than fourteen months after the last element of information against him has been received by the government,

And where the delay in informing the defendant of the accusation against him is totally unexplained and no justification therefor is shown, and the defendant testifies plausibly to his inability to recall the events of dates under consideration, then

Has that defendant been denied his constitutional right to a speedy trial?

15. Where a defendant contends that he has been prejudiced by adverse publicity in a magazine nationally and popularly published (Life Magazine), is his failure to ask for removal of the case to another district material to his claim of prejudice?

16. Where on jury selection, a prospective juror states in the presence of all other prospective jurors that the defendant has received substantial and continuous adverse publicity over many years, should a mistrial be declared on defendant's motion?

17. Where a defendant in a counterfeiting case is, through an emotional outburst of a government witness, inferentially accused of complicity in a murder, and where the trial court in his subsequent remarks actually broadens the scope of that accusation, should a mistrial be declared?

STATUTES INVOLVED

Title 18, U.S. Code, Section 371, provides, in relevant part:

> If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be (punished).

Title 18, U.S. Code, Section 472, provides, in relevant part, as follows:

> Whoever with intent to defraud, passes, utters, publishes, or sells . . . or keeps in possession or conceals any falsely-made, forged, counterfeited or altered obligation or other securities of the United States, shall be (punished).

Title 18, U.S. Code, Section 473, provides, in relevant part:

> Whoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine, shall be (punished).

The Sixth Amendment to the Constitution of the United States provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation . . .

STATEMENT OF THE CASE.

Petitioner Paul Panczko was alone indicted on October 29, 1964 in two counts charging: (1) that he conspired with Guy Mendola, Paul Lacinak, Robert Connors and Granville Turner from September 1, 1960 to August 29, 1963 contrary to Sec. 371, Title 18, U. S. Code to violate the laws against counterfeiting; and (2) that on September 15, 1960 he violated Sec. 473, Title 18, U. S. Code by selling, transferring and delivering counterfeit money to Paul Lacinak. (A. 1-3).

Evidence For The Government.

Paul Vincent Lacinak was briefly employed in September, 1960 in Chicago as a photographer. At that time he had been thrice convicted of felonies, and was using the name Paul Lowder. (A. 6-7) He had some experience in photography. His employer issued him good camera equipment, a tripod and lights, and trained him in their use. (A. 18). After four days, Lacinak disappeared with the equipment, and his employer did not see him again until 1965, at defendant's trial. (A. 18).

During the same month, Lacinak left Chicago with his family (A. 9). They were driving a Thunderbird owned by a man in Peoria, and which Lacinak had taken without authority (A. 15). They proceeded, according to his testimony, through Indiana, Kentucky, Arkansas and Missouri (A. 10). Lacinak's wife, also a government witness, testified that they also went through California, Utah and Colorado (A. 22) and "all over the south" (A. 25).

In the car, according to the testimony of Mr. and Mrs. Lacinak, was a quantity of approximately $7,000 in counterfeit ten dollar bills (A. 9, 21). The Lacinaks testified that they spent those bills throughout the south, west and midwest. However, not one counterfeit bill passed by them

to any member of the public was ever located, as far as the record shows.

In December of 1960, according to Lacinak's testimony, he was in Bellaire, Ohio, living under the name of Brinks. While drinking in a bar, he commenced a conversation with a man sitting next to him. He told the man, one Connors, a total stranger (A. 16), that he needed a car. Connors said that he needed money and had just been released from the penitentiary. Connors went out and found a Ford convertible which he gave to Lacinak. Lacinak knew it was a stolen car (A. 17). Lacinak, in turn, gave Connors the Thunderbird. He also gave Connors a bundle of counterfeit money. Connors knew that the money was counterfeit. The money was given to Connors in Lacinak's hotel room by Lacinak's wife. At that time, Connors saw in Lacinak's room, equipment which he believed to be counterfeiting plates[1] (A. 27-28).

Some three months later, in March of 1961, Lacinak was in Arizona working for a construction company, a job which he held for "several weeks" (A. 11). While there, he met government witness Granville Turner (A. 11), a brother of his employer. Lacinak was again using the name Lowder (A. 28).

After they had spent a few hours together, Turner advised Lacinak-Lowder that he was in trouble with the police in Indiana and needed money. Lacinak told Turner that he had counterfeit money available, and asked whether Turner would like to have it. Turner said that he would.

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[1] Connors did not testify at the trial. A federal prisoner at the time, he was brought to this District on a writ of habeas corpus ad testificandum, obtained *ex parte* by the government, but was sent back to the penitentiary the following day (A. 42). The statements here attributed to him were recited in the testimony of secret service agent Mroz who interviewed him.

Thereupon, Lacinak and Turner went to Lacinak's home where Lacinak's wife, at his direction, gave Turner a bundle of counterfeit money (A. 12). It was an outright gift. Lacinak told Turner the bundle contained $4,000, but on counting it, Turner found about $2,500 (A. 29).

At that time, Lacinak asked his wife whether she wanted to keep $1,000 of the counterfeit money for herself. She replied, referring to Turner, "Let him have it all, we can get more." (A. 31).

Lacinack advised Turner that he had obtained the counterfeit money from a relative (A. 29). (He is not related to defendant in any manner (A. 42)).

Lacinak testified that he never sold any of the counterfeit money, but simply gave it away (A. 16). From time to time, he passed counterfeit $10 bills, using the proceeds for his personal needs (A. 16). According to Lacinak's wife, for one period of three and one-half months, the Lacinaks travelled all over the southern part of the United States, passing the counterfeit money, in places like grocery stores (A. 23). On redirect examination, Lacinak claimed that he passed a total of about $3,000.00 in counterfeit (A. 17). However, there was no corroboration of the Lacinaks' account of passing those bills. No such bills were introduced in evidence, nor was there any testimony from or concerning any person thus allegedly victimized. It would seem that all those bills, if passed, must have been passed within less than six months, because the gift to Turner in March of 1961 was, according to Mrs. Lacinak's testimony, the entirety of the counterfeit then remaining in their possession (A. 23).

At no time did Lacinak share any proceeds of the counterfeiting with anyone else (A. 16).

Three groups of counterfeit bills were introduced into evidence by the government. The first of these, Group Exhibit 3, were 7 counterfeit notes passed by Connors. They were duly identified by a West Virginia policeman and a secret service agent (A. 27).

Group Exhibit 4 consisted of 7 counterfeit bills passed by Turner in an Indiana men's shop. They were thus identified by Turner (A. 30), the shopkeeper (A. 32) and an Indiana policeman (A. 32).

Group Exhibit 5 were 95 notes which were part of a group sold by Turner to a man named Kish for $200. They were identified by Kish, then on parole for the offense (A. 32), and by a secret service agent who participated in Kish's arrest (A. 33).

Evidence Involving Petitioner.

Lacinak testified that while working as a photographer, and prior to this theft of his employer's equipment, he contacted one Mendola, who died before the indictment was returned. Mendola, according to Lacinak, helped Lacinak dispose of his employer's camera equipment (A. 8), and was going to enter the advertising business with Lacinak. However, Mendola decided that the advertising business was too complicated, and proposed instead that Lacinak pass counterfeit money (A. 8). Mendola thereupon introduced Lacinak to petitioner, who promised to get counterfeit money for Lacinak (A. 8).

At one o'clock the following morning Mendola, petitioner and another man appeared in Lacinak's motel room while Lacinak was asleep, awoke him, and told him to meet them the next morning at a bowling alley (A. 8).

The next morning, at the bowing alley, Lacinak saw Mendola and petitioner in Mendola's car. Petitioner gave

him a package containing counterfeit money. It was agreed that the proceeds, after expenses, would be "split three ways after the expenses of the trip (A. 9). Lacinak was asked to return to Chicago as soon as possible, after passing the money in the Ozarks, because there would then be "traveller's checks" available.

Lacinak and his wife then left on their trip. They went to Indiana, then Kentucky and then Arkansas. In Arkansas, a person kept looking at him when he cashed one of the bills, so he drove to Springfield, Missouri. From there, he called Mendola (A. 10), told him that the counterfeit money was of poor quality, and asked for money to return to Chicago. Mendola agreed, directed the witness to return to Chicago with the money, and telegraphed him $100 to use as expense money on the return trip. The witness testified that he picked up the $100 at the Western Union office in Springfield (no corroborative Western Union records were introduced). He simply took the money, continued on his way, and did not return to Chicago. For the next two or three months, he travelled around the country with his wife cashing the counterfeit bills (A. 10). He never gave any money to Mendola or to the defendant (A. 16).

Lacinak further testified that government group Exhibit 3, being seven bills traced to Connors, "looks just like" the money he received the morning he left Chicago. Government group Exhibit 4, seven bills negotiated by Turner in the men's store, was, according to Lacinak's testimony, "money he received at the bowling alley". Government group Exhibit 5, consisting of 95 bills traced from Kish to Turner, was, according to the witness's testimony, "just like" the money he received at the bowling alley the morning he left Chicago.

Indictment.

Connors was arrested in December of 1960 (A. 26). He made a statement to the police, and the police began to look for "Lowder" (A. 27). Turner, meanwhile, had been arrested on the counterfeiting charges in April of 1961, and convicted the following June (A. 28). Kish had been arrested in April of 1961 (A. 31). In August of 1963, "Lowder" was arrested and his true identity known. At that time, he gave government agents a statement implicating the defendant (A. 27).

In September of 1963, Lacinak pleaded guilty to counterfeiting (A. 14) and was also convicted of offenses related to motor vehicle theft (A. 7). He was still a federal prisoner at the time of trial.

During the ensuing fourteen months, not one item of evidence came to the attention of the authorities, and the record does not disclose any additional investigative effort. In August of 1964, Mendola died.[2]

On October 29, 1964, the defendant was indicted in two counts: one, charging that from September of 1960 to August 29, 1963, the defendant conspired with Mendola, Lacinak, Connors and Turner to pass counterfeit bills; and two, charging that on September 15, 1960 he transferred counterfeit bills to Lacinak (A. 1-3).

Defense Evidence.

Defendant testified, denied his involvement, and stated he had never committed a counterfeiting offense and he

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[2] The witness Mendola gave the date of death as August 1965 (A. 33). However, it is quite clear that he was mistaken as to the year. The indictment returned October 29, 1964, refers to "Guy Mendola, now deceased." (A. 1).

had not seen Lacinak since 1959. He further testified he first learned of the accusation against him on October 30, 1964 and could not remember the specifics of his actions during September of 1960. When first accused in October of 1964, he was then likewise unable to remember his specific activities during September of 1960 (A. 43-44). His evidence was inferentially corroborated by his wife, who testified she had not met the defendant until 1961 and had never seen Lacinak (A. 42-43).

Proceedings in the Trial Court.

Motions to dismiss the indictment because of vagueness, for a bill of particulars, to dismiss the indictment because untimely brought, for a continuance because of prejudicial publicity, for a mistrial, for a directed verdict of acquittal were all denied by the Court. (A. 3-5).

A jury convicted the defendant on both counts, and the court sentenced him to 5 years on the conspiracy count and to 10 years on count 2, the substantive count, the sentences to run consecutively for a total of 15 years. (A. 5).

Proceedings in the Court of Appeals.

Petitioner appealed from his conviction to the United States Court of Appeals for the Seventh Circuit. As his principal assignment of error, he claimed that his conviction had been the product of prosecutive abuse of the doctrine of conspiracy, and that the conspiracy charge had served as an evidentiary and procedural tool for the accomplishment of illegitimate objectives. (Appellate Brief, pp. 19-31).

The Court of Appeals affirmed the conviction, rendering an opinion which did not discuss or refer to that contention.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

Petitioner believes that the most effective preface to his argument, is the following inadvertent statement of the Government's position:

> "Conspiracy is an extremely important crime for our consideration because it is used as (a) technical indictment crime * * *
>
> "The question arises then as to why conspiracy is charged as the crime if the [substantive offense] itself can be proved. The answer to this question lies in the evidentiary rule that conspirators are considered to be agents of one another for the purpose of achieving the object of the agreement. Being such agents, statements made by one conspirator are admissible in evidence against all of the conspirators. Likewise the overt act, if done by one conspirator, is taken to be the act of all on the basis of this agency principal (sic).
>
> "However, if the defendants were each charged only with the crime of, for example, espionage, statements and actions by one defendant would be admissible in evidence only against that defendant. Thus the problem of evidence is multiplied if conspiracy is not charged and accordingly reduced if conspiracy is charged." *From Instructor Folder 39062, U.S. Army Intelligence School, Fort Holabird, Maryland, "Investigative Legal Principles", quoted in Motion for New Trial, R. 30-31.*

Your Honors ". . . have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." *Grunewald* v. *United States*, 353 U.S. 391, 404, (1957).

The warnings have not been heeded. The foregoing quotation from a government manual, shows why.

The bald fact is that the pronouncements of this Court concerning conspiracy prosecutions, have been almost totally ineffective. The conspiracy charge is too handy and powerful a weapon, to be used with restraint. And the conspiracy mystique has generated a paralogical vernacular of its own, with each conclusion implicit in its premise.

Thereby, the appearance of scrupulous adherence to this Court's rulings is painstakingly preserved, while the rulings themselves are effectively circumvented.

If there has been a criminal action brought in recent years in the District of moving counsel, involving more than one defendant, in which a charge of conspiracy was not made, it has escaped the attention of the writers.

For conspiracy seldom is charged in furtherance of an attempt to punish the discrete offense denounced by the conspiracy statute.

Instead, the charge of conspiracy is ordinarily nothing more than an evidentiary technique: A means by which testimony which is logically inadmissible becomes technically competent.

The conspiracy statute, therefore, performs an office whose thaumaturgical equivalent is levitation. The conspiracy is proved by evidence which is admissible only on the theory that the conspiracy has first been proved. The resulting trial records consist in a hodge-podge of inflammatory innuendo whose dissection on appeal will defy the scalpel of the most skilled of legal surgeons. No one is quite sure, when it is all over, exactly what has been proved, or against whom.

The net which found this Court's disfavor in *Grunewald,* had long since been woven of interstices so complex that neither the size of the prey nor the nature of the field affected its operation. Nor was its efficiency diminished by *Grunewald.* Striding contemptuously across all of jurisprudence like a collossus, it continued unchecked, ingesting new vigor from each victim that it enmeshed. Favor or disfavor, are immaterial; it is necessary only briefly to avert one's gaze, and the growth of the organism will have surpassed any bounds previously known.

But even by the very loose standards, if any, which have heretofore delineated the boundaries of permissivness in conspiracy prosecutions, Petitioner's case is unique and outrageous.

Petitioner was the only defendant ever charged in the case. All other persons involved, had been prosecuted or excused, or had died. The conspiratorial object had been completed more than four years before the indictment was returned. Petitioner's alleged acts did not throw light on the activities of any other person, nor did any other person perform an act which cast light on Petitioner's activities.

Yet, the defendant was charged with conspiracy.

Nobody familiar with federal criminal procedures, can doubt the reason behind that charge.

The charge of conspiracy was baldly, boastfully designed and used to facilitate the reception of evidence of the private conversations and acts of the government witnesses.

The conspiracy charge was pleaded in such a manner as not only to obscure but affirmatively to disguise the nature and cause of the accusation.

The litany of standard conspiracy instructions, relieving the government the necessity of all relevant proof, served further to mask from the jury the issues in the case.

The procedure was shameful. And the refusal of the Court of Appeals to acknowledge that a complaint was made, does not mitigate the unpleasant features of the procedure.

In the average Petition for Certiorari, it is contended that a recitation within the opinion being reviewed will create an unfortunate precedent.

The implications of this Petition are much more sinister.

In the Court of Appeals, it was Petitioner's principal contention that his conviction on both counts, was the product of abuse of the doctrine of conspiracy. (Br. 19-31)

That Court has issued an opinion which constitutes a *denial* that any such contention was made before it!

Thus, casual readers of the opinion will have no notion that it constitutes a landmark in the extension of the application of the conspiracy statute.

But the prosecution will know.

They will know that the Court below will entertain no challenge to any use or abuse that the prosecution may make of the conspiracy doctrine.

They may even conclude that the Court's silence on the issue, may be viewed by them as something more than a refusal even to acknowledge any complaint that a conspiracy prosecution could be unjust.

That is more encouragement than has ever been needed, to cause prosecutors to devise ingenious new uses for the conspiracy statute.

* * *

The generally accepted elements of due process are notice, an opportunity to be heard, and findings based on the evidence. *Tot* v. *U. S.*, 319 U.S. 463, 473; *Smith* v. *Dental Products Co.*, (7 Cir., 1948) 168 F.2d 516, 519.

Characteristically, an offended litigant contends in the reviewing court that he was denied due process at the trial level.

Yet, there can be no question that the requirements of due process are mandatory at the appellate, as well as at the trial level. (*Griffin* v. *Illinois*, 351 U.S. 12, 18.)

Petitioner directed the basic thrust of his appeal, to the proposition that a misuse of the conspiracy statute had been the basic cause of his conviction (Appellate brief, pp. 19-31).

The Court of Appeals responded with a discussion of four other issues. It concluded: "*Finally*, defense counsel complains that the instructions to the jury were prejudicially erroneous." (Appendix A, p. 6; Emphasis added.)

And no word concerning Petitioner's basic contention.

The Court of Appeals literally turned a deaf ear to Petitioner's complaint of prosecutive misuse of the conspiracy technique.

Petitioner spoke; but nobody listened. That cannot satisfy his right to be heard. He was not heard.

The green light of approval for future prosecutive excesses under the all-conquering banner of conspiracy, was given at the cost of denial to Petitioner of due process of law before the United States Court of Appeals for the Seventh Circuit.

The prosecutors will understand the lesson of the opinion below.

Determined silence can be made more eloquent than any words in shaping judicial procedures.

* * *

There was never any question but that the charge against Petitioner must be conspiracy. The evidence was too weak to convict unless conspiracy techniques were used. The question was merely one of procedure.

At the outset, one might ask, not unreasonably, what *legitimate* purpose the government might have had in mind, in bringing a charge of conspiracy? Not merely in consequence of severance or dismissal, but from the very commencement of the case, Petitioner was the only defendant.

None of the normal *ad hoc* rationales was available to justify the conspiracy technique of prosecution. There was no alleged act or declaration on Petitioner's part which became meaningful, only when viewed in the light of the acts and declarations of others. The "only" thing that Petitioner was supposed to have done, was knowingly, deliberately and corruptly to hand Lacinak $7,000 in counterfeit money and ask for a share of the proceeds. This is much too straightforward a transaction to suit the normal demands and intents of a conspiracy prosecution.

Nor was there any act on the part of anyone other than Petitioner, which became understandable only in the light of defendant's acts and declarations. Each and every other person supposedly involved, had unequivocally passed counterfeit currency, knowingly, deliberately, and corruptly. No rationale there.

Nor was there a corrupt agreement which might go unpunished but for the conspiracy statute. Everyone supposedly involved, save only Petitioner, was either dead or convicted. In fact, there was not even evidence of an agreement except on a tenuous rationale, and almost nothing that Lacinak could be proven to have done—literally nothing corroborating his story — in pursuance of an agreement.

There were, in short, none of the ordinary pious trappings of the conspiracy prosecution. The prosecutors thought, hard and long. Then — Ah!

It was the government's ultimate *evidentiary* theory that Petitioner, at Mendola's request, voluntarily gave Lacinak counterfeit bills in exchange for a percentage of any profit when Lacinak passed them. Like any other voluntary transferor, Petitioner necessarily "agreed" to transfer, according to Lacinak's story.

Agreed! The magic word. Agreed = conspired, in the semantic-algebraic mystique of the prosecutor.

Very well. The way is now open to charge a conspiracy. But *what* conspiracy?

Certainly not a conspiracy between Mendola and Petitioner to transfer counterfeit to Lacinak. Much too straightforward, that. Petitioner would know exactly what he was charged with. But more important, it is also much too restrictive. That conspiratorial accusation would have been totally dependent upon Lacinak's uncorroborated word. It would have terminated upon Lacinak's receipt of the counterfeit money — or at the latest, when Lacinak supposedly agreed with Mendola to abandon the enterprise. All of the initialled, lock-sealed, carefully preserved evidence went no further than to corroborate the accusations

of Turner and Connors against Lacinak; it would be wasted under a conspiracy charge that simple. Not one agent or officer could testify. The lack of corroboration would become obvious. No. Not that. Never.

How about a charge that Petitioner conspired with Lacinak? No. Much too likely to run afoul of *United States* v. *Ford,* 7 Cir., 324 F. 2d 950, 952 (1963). Ordinarily, a vendee does not conspire with his vendor, since their objectives are completely dissimilar. Besides, on the face of Lacinak's story, none of the evidence concerning Connors, Turner, Kish, et al., would be admitted in evidence on such a charge. For on the face of Lacinak's statement, the transfers to Connors and Turner (and thus, Turner's transfer to Kish) were completely outside, *and in derogation of,* any conspiracy that might be said to have existed between Lacinak and Petitioner, even if all the other objections be met. The initialled exhibits, the custodial chain, the impressive agent testimony supporting that chain—all these would be lost.

Well, then, why not charge a conspiracy between Lacinak and Petitioner, and introduce proof of some transfer *pursuant to that conspiracy?* In all the months that Lacinak travelled and, he says, passed counterfeit currency throughout most of the continental United States, surely there must be one such transfer that can be shown. Lacinak is cooperating. His memory is nothing short of amazing. Surely one shopkeeper, one service station, one something, anything, can be found with his help. There will be a corroborated story, and the conspiracy charge will serve a sort of master-servant agency doctrine.

The very thing!

—But no. It can't be done. Never mind why not; it simply can't. No point in asking why. The defendant

will not be allowed to ask those questions of the prosecution, so there is no reason why the prosecution should waste time on such questions intramurally. Just plain no. That's all.

Well . . . well, if you're *sure* it can't be done. . . .

—We're sure. Take our word for it, and DON'T ask any more questions, because the next question is liable to be *real* trouble.

Well, then. How about this:

Suppose Petitioner is charged with a conspiracy with Mendola *and* with Lacinak, *and* with Connors *and* Turner as well? And suppose we allege that the conspiracy lasted until they were all arrested, and that they agreed to pass counterfeit all over the country, and to conceal their acts after they did so, and. . . .

—Wait a minute. It sounds good, but no matter how you look at it, Connors and Turner never conspired with Petitioner. The best we can say is that Lacinak, in derogation of the purposes of some conspiracy or other, gave counterfeit to Turner and Connors.

Well, so what? We don't have to prove all our allegations in a conspiracy case. Plead it that way, and the evidence will go in. And another thing: Plead it that way, and no matter whether Lacinak is lying or telling the truth, Petitioner won't have any idea what we're talking about.

And it was done. And the evidence went in.

THE CONSPIRACY "EVIDENCE".

The government attempted to corroborate Lacinak by showing that in casual, narrative conversation he had told his wife that he would get counterfeit money from Peti-

tioner. (A. 20). When the defense objected to conversations between Lacinak and his wife, the objections were overruled on the grounds that the conversation constituted "an *admission* by the co-conspirator during the course of the conspiracy." (A. 20; emphasis supplied). The defense pointed out that this is exactly the kind of evidence *forbidden* in a conspiracy case (*Krulewitch* v. *United States,* 306 U.S. 440, 442-443; *Baxa* v. *United States,* 381 U.S. 353, rev'g 340 F. 2d 259). The trial court ruled that the evidence was admissible because "I assume the conversation may cover not only what her husband may have done, but what your client may have . . . I mean, his part in the transaction as well." (A. 20).

Beyond argument, that is a fundamental misstatement of the issue of admissibility. The test applied in the trial court is merely a test of relevancy, and not a test of furtherance. "When the intent element of furtherance is eliminated, 'the narrations of a loose-tongued prima facie confederate at some social gathering (become) admissible as against his alleged conspirators'." 72 Harvard L. Rev. 985 (sub-quote from *State* v. *Erwin,* Utah 1941, 120 P. 2d 285, 318). And that is precisely what the trial court admitted in evidence. Lacinak was "corroborated" by his wife's testimony that he had once told her that defendant was the source of the counterfeit money.

With the doors opened, Mrs. Lacinak went on to testify over the defense objection, that her husband went to several drug stores, telling her that he was looking for hair rinse. He also told her, she testified, that defendant had told him to use that type of hair rinse on the money. (Tr. 180). The statement did not further the conspiracy; it merely provided evidence to be stored and subsequently used against the absent subject of the supposed conversa-

tion. If it furthered a conspiracy, it was the conspiracy pursuant whereto Mrs. Lacinak was excused from criminal responsibility and given privileges granted few persons in her position.

The government apparently realized that it was under an obligation to corroborate Lacinak's story that Mendola sent him money by telegram. Apparently, such corroboration could not be obtained from the Western Union Company. But there was one unfailing source of corroboration, one well that was never found dry. Mrs. Lacinak testified (same objection overruled) that her husband told her one night that Mendola would send them some money. (Tr. 184).

Nor was corroboration lacking as to Lacinak's story of a narrow escape. Lacinak said he had passed a counterfeit bill at a grocery store, and had left quickly when the storekeeper became suspicious of the bill. Corroborated, indeed, but not by the storekeeper. Instead, Lacinak's wife dutifully testified that her husband had told her about it after it happened (A. 21-22).

With absurd detail, including initials and sealed envelopes, the Government traced the custody of counterfeit currency *after* Kish and Connors had passed it (A. 32, 33). The government had no corroboration of Lacinak's incrimination of Petitioner; but this pseudo-evidence corroborated *something,* and gave the government a chance to parade its enforcement officers before the jury. Such precise proof of one-quarter of a custodial chain, also tends to gloss over the absence of any meaningful connection between that evidence and the defendant on trial.

Thus, the evidence expressed the philosophy of conspiracy prosecutions: There is no such thing as hearsay. There is no such thing as irrelevance. And there is no

such thing as a failure of proof, because there was certainly a crime by someone—the chief government witness, if nobody else.

On that state of the record, we feel justified in characterizing the conspiracy charge as a mere evidentiary technique, which served its purpose of convicting the defendant of an amorphous charge on hearsay.

And by such tactics *both* counts were proved.

Exactly as advertised by the quoted manual.

THE CONSPIRACY CHARGE.

The indictment charged that from September of 1960 until August of 1963, Petitioner conspired with Mendola, and Lacinak, and Connors and Turner to pass counterfeit $10 bills (A. 1-2). It was a prosecution which was dedicated to the questionable proposition that in a conspiracy case, *no* rules of pleading are applicable. It is beyond legitimate question that even if Petitioner was a conspirator, his conspiracy was something vastly different from the conspiracy that was pleaded. So very much so, that if today Petitioner were indicted for conspiring with Mendola to transfer counterfeit money to Lacinak, there is a serious question whether he could plead double jeopardy.

The indictment described the conspiracy as follows:

1. The conspirators "would procure, unlawfully," quantities of counterfeit notes. Except for extrapolation from Lacinak's testimony that Petitioner gave him such notes, there is no shadow of such evidence. For all that appears, the notes could have been willed to Petitioner before his birth, or manufactured by him, or found on the street.

2. The conspirators would pass such counterfeit "in the Northern District of Illinois and elsewhere." No bill was ever passed in the Northern District

of Illinois, and Lacinak's testimony is that such bills were intended to be passed only "elsewhere." (A. 8, 9).

3. The conspirators "would misrepresent, conceal and hide" their purposes and acts. There is nothing to support that allegation—literally nothing.

And that was the *totality* of the conspiracy as pleaded.

Neither the identity of the conspirators, nor the objects and purposes thereof, was proven as alleged. Guilty or innocent, Petitioner could not possibly have known what he was charged with. The language of the indictment is clear, to be sure, but what was proved against Petitioner was something so totally different as to have made it impossible for him to prepare a defense or conduct a trial meaningfully. Even counsel necessarily were fooled, waiting for the evidence that never came, refuting a pleaded theory that was never taken seriously by the prosecution.

The indictment was a simple red herring. And there was a total failure of proof of its allegations.

And even more: The indictment alleged five overt acts in pursuance of the conspiracy. One of these was the transfer from Lacinak to Connors (A. 2). Another was the transfer from Lacinak to Turner (A. 3). The jury were instructed that it was not necessary to prove all of the overt acts; any one of them would suffice, and "proof of the conspiracy is then complete * * * regardless of which of the conspirators committed the overt act." (Tr. 537).

Thus, even though it was beyond argument that the transfers by Lacinak to Connors and Turner were not done in pursuance of the conspiracy, were not proper overt acts, and in fact neither Connors nor Turner was a conspirator with defendant—notwithstanding all these things,

the jury were told otherwise, and were told that either of those transfers would be sufficient as an overt act to convict defendant of conspiracy.

The vice of this goes beyond the fact that the jury were thus instructed that they could convict defendant on insufficient elements of guilt. That alone, of course, is fatal. But quite beyond that, to instruct the jury that those transfers, if proven, were overt acts, was completely to misinform them as to what a conspiracy is, and how it may be proven, and what the limitations are.

In ultimate terms, the transfers from Lacinak to Connors and to Turner were the *only* portions of Lacinak's story that were corroborated. If the jury believed only that portion of his story which was corroborated, they could not have convicted Panczko of conspiracy under proper instructions, because the transfers to Lacinak and Turner were not—beyond argument, were not—overt acts. But the jury did not receive proper instructions. And so, if the only "overt act" they believed to have occurred was the *gift* from Lacinak to Turner, they were free to convict under the court's instructions.

The remaining three "overt acts" likewise contribute nothing to the statement of a crime.

Overt act "B" was alleged to be a conversation between Mendola and Lacinak. Lacinak testified that such a conversation occurred, but *before* a conspiracy was formed! (A. 8).

Overt acts "A" and "C" were pleaded as a conversation and a meeting, respectively, between Lacinak and Petitioner. The testimony of Lacinak, the sole witness to all these "overt acts", shows that probably both but at least one of the acts was nothing less than the very formation of the supposed conspiracy (A. 8, 9).

Thus, the act of conspiring was deemed in itself fulfillment of the statutory requirement of an "act to effect the object of the conspiracy." (Title 18 U.S. Code, Sec. 371). The same of an act performed *before* any conspiracy was formed.

A conspiracy charge encourages illogical pleading, true. But there must be some limit.

Of the five pleaded "overt acts", at least four were no such thing. Yet, the jury were told that the government need prove only one of the five.

THE IDENTITY OF THE CONSPIRATORS

By telling the jurors that the acts of Connors and Turner were overt acts, the trial judge necessarily ruled that those men were legally co-conspirators with Petitioner. For under the Statute, only a co-conspirator can perform an overt act. Title 18 U.S. Code, Sec. 371.

But Connors and Turner were never, remotely or arguably, members of a conspiracy which included Petitioner. There was never any reason to imagine they might have that status. It was merely a matter of standard prosecutive conspiracy technique, to make that allegation.

Many months after the conspirators agreed to end the conspiracy, according to Lacinak's testimony (A. 10, 11) he gave the counterfeit money to two strangers in separate transactions (A. 11).

Those gifts were not made in furtherance of the conspiracy (A. 17). In fact, they were made in *derogation* of the conspiracy.

Yet, the donees were deemed co-conspirators with Petitioner. Petitioner was held responsible for their actions.

The result below is directly opposite to that reached by Judge Learned Hand in 1938, in a case factually indistinguishable from this one. *United States* v. *Peoni*, 2 Cir., 100 F. 2d 401, 403.

But that was 28 years ago. The reach of the conspiracy statute is now "modernized"—i.e., broadened.

That, really, is what frightens us.

If the "net" decreed by this Court in *Grunewald* is to have any limitation whatever, it must be checked short of this point.

With equal logic, a car thief could be deemed a conspirator to violate traffic laws, if a remote transferee of the stolen vehicle runs a stop light years after the theft.

We suggest that analogy with some hesitancy. In the field of conspiracy law, today's grotesque hyperbole has a way of becoming tomorrow's settled rule.

THE CONSPIRACY INSTRUCTIONS.

The discussion of the overt acts and the identities of the conspirators, at earlier portions of this Petition, has included some reference to the effect of the standard conspiracy instructions as applied to this case.

But the instructions deserve more searching attention.

The Court of Appeals, without discussing the actual instructions given, holds that they were "conspicuously free from error."

And that is all that the prosecutors have to hear. They know what instructions were given. Those instructions will now be given in every conspiracy prosecution—which, on the precedent of this case, will mean almost every federal criminal case, at least in Petitioner's district.

Those instructions (a protracted litany listing the many things that the government need not prove) contribute greatly to the popularity of the conspiracy charge.

The standard conspiracy instructions are, we think, to be applied in all cases with caution. They serve, at best, to encourage slipshod pleading in conspiracy indictments, on the premise that the proofs will not have to support the allegations as long as *some* conspiracy is shown. And at worst, as in this case, they permit an indictment to be so drawn as to disguise from the defendant, the nature of the accusation. The standard list of things that the government does not have to prove, as contained in the stock conspiracy instructions, constitutes an open-end indulgence for such actions.

In the case at bar, considering that the pleaded conspiracy could not even arguably be supported, the instructions were misleading at best, and probably argumentative of the prosecution's case in the eyes of the jury. The instructions were given because they were conspiracy instructions, and not because they had any relationship with the case being tried. No such relationship existed.

The instructions were not mere harmless abstract statements of the law of some other case. Rather, they advised the jury that it was not necessary to believe the prosecution's case in order to convict the defendant.

For example, the jury were given the standard instruction that express words were not necessary to generate a conspiracy (R. 534). That, in the face of the fact that the prosecution's entire case consisted of accomplice testimony which, if it meant anything, tended to show that defendant had either directly conspired in expressed words, or had not conspired at all. There was no middle ground.

The jury were further given the standard instruction that a financial stake in the venture would be something to be considered, but was not dispositive, in determining

whether Petitioner were a conspirator. That instruction might have some relevance in a case in which a defendant claims that his participation was inadvertent. But in the case at bar, the only prosecution evidence was that the defendant was to receive one-third of the proceeds of the counterfeit; the only defense evidence was that the defendant had never had any connection with the matter. In those circumstances, especially when the hotly contested issue was referred to as "this evidence", the instruction at best confused the jury, and at worst directed a finding of guilty.

The same is to be said for the standard instruction, given in this case, that the "statements of any conspirator which are not in furtherance of the conspiracy . . . may be considered by you as evidence only against the persons who made them." Considering the vast number of vicarious declarations, and considering that there was only one defendant on trial, this instruction literally jars the ear of reason. It is nothing more than a hyper-technical mitigation, for the record, of blatant hearsay.

The charge was further in error in its basic definition of what a conspiracy is. For it defined a conspiracy as a group rather than an act. The jury were instructed that the conspiracy "was a combination of two or more persons to accomplish an unlawful purpose or a lawful purpose by unlawful means." We can only conjecture what the reference to a lawful purpose by an unlawful means could have meant to the jury. But more fundamentally, a conspiracy is not a combination of persons. A conspiracy, by statute and by logic, is not a group but an act: the act of agreeing to commit a crime. To define a conspiracy as a group, is to misinform the jury as to what the defendant is charged with.

It has been aptly observed that "perhaps the most important factor" in the weakening of the basic principle that a conspiracy must involve an agreement,

> " . . . is another result of the verbal ambiguity which leads courts to deal with the crime of conspiracy as though it were a group rather than an act . . . (T)his [is] reasoning from a faulty premise—a premise difficult to discover since it is assumed rather than articulated . . . " 72 Harvard L. Rev. 933-934, Note, "Developments in the Law — Criminal Conspiracy.

From now on, it will be articulated. * * *

The court's instructions were, we feel, likely to be understood by the jury as a "hanging charge".

For no apparent purpose, the jury was instructed that it must not consider, and should not even discuss, the matter of punishment (R. 543). That instruction could not have served any legitimate purpose. As a bona fide attempt to instruct the jury on the issues, it was about as irrelevant as would be telling the jury that they must not grant the defendant a divorce. Its only possible effect would be to encourage the jury to find the Petitioner guilty with the assurance that the judge would then handle the matter properly. Or, in the judge's words, "This matter is committed to the attention of the court alone". (R. 543)

The defense tendered instructions (Nos. 12 and 14) reciting that the testimony of witnesses who themselves confessed to the counterfeiting "is to be received with great caution and acted upon only after it is carefully weighed and closely scrutinized." The court, however, instructed the jury as follows: "If the jury believes that any such person directly participated in the commission of the offense charged in this case, his testimony should be closely examined and weighed with great care". (R. 541).

Thus, to the contrary of instructing the jury that it should be cautious and hesitant in accepting the testimony of such persons, the court actually told the jury to pay special attention to them, presumably because of their superior knowledge of the events. That was fundamental error. The defendant was entitled to "careful instructions" pointing out the inherent impairment of the credibility of such a witness. *On Lee* v. *United States,* 343 U.S. 747, 757 (1952). The force required of such an instruction, depends upon the degree of the informer's corroboration. *United States* v. *Green,* 7 Cir., 1964, 327 F.2d 715, 719. Where, as here, there is no meaningful corroboration, the instruction should advise the jury that the testimony of such a witness should be accepted only with great caution and suspicion. *United States* v. *Masino,* 2 Cir. 1960, 275 F.2d 129, 133; *Fletcher* v. *United States,* D.C. 1946, 158 F.2d 321, 322.

And obviously, if a witness participated "in the offense charged in this case," the Petitioner is necessarily guilty. For "the offense charged in this case", is conspiracy and counterfeiting *by the Petitioner.* The instruction is reversible error on that basis alone. *United States* v. *Balodimas,* 7 Cir. 1949, 177 F.2d 485, 487.

To suggest that such testimony be "closely examined" and "weighed with great care", especially in that context, is to state the exact reverse of the law applicable to the situation.

And to state, as the Court of Appeals did, that the instructions are "conspicuously free from error", is to effect a substantial charge in the law and a further departure from *Grunewald.*

In a very real sense, the prosecution was faced with a situation in which there was a fundamental lack of evidence against an accused. The customary remedy for such a situation, is to convict the accused of conspiracy. Almost anybody can be convicted of conspiracy, together with any other crime charged in the same prosecution and affected by the same evidence.

Therefore, Petitioner was prosecuted for conspiracy, and convicted. It is all quite that simple.

In 1934, Clarence Darrow rendered a memorable admonition:

> "If there are still any citizens interested in protecting human liberty, let them study the conspiracy laws of the United States." (*The Story of My Life,* 64)

But the conspiracy prosecution of defendant — singly charged with a completed offense — would not have happened in Darrow's day. Now, one short generation later, no lawyer could ask for a more singular advantage, in defending a conspiracy charge, than to be permitted to practice in accordance with the rules of construction which Darrow found onerous.

The perversion — and it is literally that — of the conspiracy statute in the prosecution of this case, cannot pass unchallenged. A defendant has been charged with a conspiracy that never existed, in order to obtain the introduction of incompetent evidence to support a substantive charge. It is repugnant to every meaningful standard of simple justice.

II.

THE SUFFICENCY OF THE PROOF.

The preferment of the conspiracy charge, together with other factors here discussed, had an effect fairly to be described as predictable: a defendant was convicted although the evidence generates the strong probability of his innocence.

We are fully cognizant of the monolithic rule that, in view of the conviction, the evidence must be viewed most favorably to the government. *Glasser* v. *United States*, 315 U.S. 60, 80.

But that is not equivalent to the assertion that any time a witness says a defendant is guilty, the defendant must be presumed guilty on review, regardless of the circumstances of the accusation, the credibility of the assertion, and contradictory facts. The rule applies, in the language of *Glasser* (p. 80), only when "there is substantial evidence to support (the verdict)."

Paul Lacinak said that he received counterfeit money from the defendant under an agreement to divide the proceeds with Mendola and Petitioner. His wife claims to have observed the defendant at times consistent with Lacinak's story, although she never saw the defendant do a wrongful act or make an incriminating statement.

Another witness, Mendola's father, claimed to have seen defendant in Lacinak's presence, although not in connection with any wrong doing, at about the time of the offense.

So far as evidence against the Petitioner is concerned, that is the government's entire case.

A witness has said that the defendant is guilty.

Although we contend that the jury's verdict was affected by improper influences, we assume here that the jury believed the witness.

But that is not, and cannot be, the beginning and the end of the inquiry.

The proper inquiry is, we suggest, much more searching than whether some witness has said the magic words which constitute technical guilt under the statutes.

On the evidence heard below, any reasonable man *must* have a reasonable doubt of the defendant's guilt, *United States* v. *Westerhausen*, 7 Cir., 283 F.2d 844, 853 (1960).

There is evidence of guilt. But there is no *substantial* evidence of guilt—none. *United States* v. *Ford*, 7 Cir., 324 F.2d 950, 952 (1963).

For the simple fact is that *every* statement that Lacinak was objectively shown to have made, and *every* act that he was objectively shown to have performed, is totally and irreconcilably inconsistent with his claim that he passed counterfeit money as agent for the defendant.

Let it be remembered, that Lacinak gave out counterfeit money in wholesale lots to total strangers at no charge. The government's evidence includes the flat statement that such gifts did not further the conspiracy and were not within its scope (A. 17). It is easy to answer, as the government did before the jury, that Lacinak's cheating of Petitioner does not make Petitioner any less a conspirator. But that argument misses the point entirely. Lacinak was not keeping the proceeds of the counterfeit money for himself; he was simply giving it away in a bountiful manner, a thing which he would be most unlikely to do if he felt compelled to account to someone else for the proceeds

of that money in order to get more. He was not "cheating" Petitioner. He was simply behaving as though Petitioner did not exist.

May it be further remembered, that immediately before embarking upon his counterfeiting venture, Lacinak, who already possessed certain skills as a photographer, arranged to obtain further training and also contrived to steal photographic equipment. Coupled with Connors' statement that he saw in Lacinak's room objects which he believed to be counterfeiting equipment, those facts cast grave doubt on Lacinak's story as to the origin of the counterfeit; for the connection between photographic equipment and counterfeit endeavors is obvious, and it is impossible to imagine what Connors could have mistaken as plates for the manufacture of counterfeit money.

May it be further remembered that when Lacinak gave counterfeit money to Turner, he asked his wife whether she desired to keep $1,000 of that currency. His wife replied that such frugality was unnecessary; and reminded him that they could get all they wanted. That assertion is completely consistent with Connors' belief that he saw counterfeiting plates in Lacinak's room. And it is totally inconsistent with the concept that Lacinak was obtaining money from the defendant on an agreement to give defendant and Mendola two-thirds of the proceeds; for in that case Lacinak would obviously be unable to get more counterfeit money without accounting for the proceeds for the first batch, and would be unable simply to give it away to new-found friends in trouble.

In casual conversation with Turner, and having no apparent reason to falsify, Lacinak told Turner that he had obtained the counterfeit money from a relative (A. 29). His motive to protect his relatives against this charge is

obvious; in fact, he admits having done so, falsely, in the case of his wife (A. 15-16).

Lacinak stated that he did not give one cent to Petitioner or to Mendola at any time. In fact, he contends—in the absence of corroboration readily available if his story is true—that *Mendola sent him* $100 when he decided to abandon the counterfeiting venture. And although Lacinak claims that he wandered through the south cashing counterfeit bills, not one such bill and not one supposed victim was ever located.

The government's case is not merely weak, but absurd on its face. Lacinak is contradicted by every objective fact in the record below.

It is very unlikely that Petitioner will ever be seriously considered as a candidate for the school board. But he is not here as a candidate for the school board, and it is quite axiomatic that the government must prevail, if at all, on the strength of its own case and not on the weakness of the defense. We therefore feel free to inquire: who is Lacinak, Petitioner's sole accuser? The answer is that Lacinak came to Chicago in a stolen car with three past felony convictions on his record. He took a job as a photographer for four days—just long enough to steal the photographic equipment and disappear. In his travels, he knowingly obtained yet another stolen car. He was a federal prisoner at the time of trial, although, like all other prisoner-witnesses in this or any other case, he "was not promised anything for his testimony", but "volunteered to be a witness". He testified that he was completely impartial in the litigation, although he refused to discuss the case with defense counsel who visited him with the permission of the court (A. 14).

Lacinak spent the first year of his imprisonment in Leavenworth. A month before the return of the indictment, at his request, he was transferred to Texarkana, where his wife resided. His wife had also requested that transfer (A. 24). A few days after her husband was thus transferred, she received a visit from Federal agents, and they told her that she would be coming to Chicago as a witness (A. 24).

She came.

Lacinak may not have received any promises; but he already received part performance of an implicit arrangement whereby his family has already geographically been reunited; and neither we nor your Honors will be surprised if physical reunion should follow shortly. On much less evidence of collaboration than this, the government has obtained many conspiracy convictions. We point out the purchased nature of Lacinak's testimony not in order to solicit a value judgment of that testimony from your Honors, but rather to answer the question why Lacinak would tell such an absurd tale if it were not true. The motive, the opportunity, the reward—all are present.

For better or for worse, it is one of the features of our society that anyone can mitigate the penalty for his own actions by saying that someone has told him to commit the misdeed. The degree of critical evaluation afforded such a story, depends upon the identity of the person accused. But almost every man in the penitentiary knows that he literally holds the key to his own cell; if he can contrive to involve someone whom the government wants to imprison more badly than it wants to imprison him, rewards are swift in coming. We do not criticize that system. We merely state that the system should be viewed realistically. The evidence against Petitioner is precisely what the evi-

dence would be against any man accused, without meaningful corroboration, of conspiratorial complicity by any convict.

Almost any convict could devise a story concerning any of his acquaintances, accusing that acquaintance of complicity, with logic at least equal to and almost certainly better than the logic provided by the case at bar. No matter how clear the evidence that the government's witness was operating on his own, nothing more is needed than the pointing of his finger to convict better men than he of lesser crimes than his own.

The spectre is simply too chilling to be permitted to pass without comment. A basic concern for human liberty demands that the situation be faced realistically.

III.

THE DELAY IN BRINGING CHARGES.

The evidence against Petitioner, viewed most favorably to the government, showed that Petitioner committed one wrongful act, in September of 1960.

It was not until October of 1964, that Petitioner learned that he was suspected of wrongdoing.

In August of 1963, Lacinak, who had been sought as the source of the counterfeit money given to Kish and Connors, was arrested. At that time, he gave government agents a statement implicating Petitioner.

If, during the ensuing fourteen months, there was any investigative activity predicated upon his charges, it was not shown by the record, and was certainly completely unproductive. The government did not introduce one sentence of incriminating testimony or one gram of demon-

strative evidence which had been acquired subsequent to the date of Lacinak's statement, and no suggestion of any investigative activity during that time was made. The government did not even produce the Western Union records, which would certainly have corroborated Lacinak's story in some degree if his story were true.

At the end of October of 1964—more than four years after the supposed offense, and more than fourteen months after the government had acquired the last of the evidence—the Petitioner found himself suddenly charged with counterfeiting.

The indictment accused him of a conspiracy with Mendola, Lacinak, Connors and Turner, extending over a period of three years. Even by the government's theory, the Petitioner had never heard of Connors or Turner; had no notion what might have happened between September of 1960 and August of 1963; and would, even if guilty, have only the most limited of notions of what the government was talking about.

And Mendola, who had been alive at the time of Lacinak's arrest, had died more than two months before the indictment was returned.

In their simplicity, the founding fathers saw fit to guarantee a "speedy" trial and to value it equally with the right to a public trial before an impartial jury in the proper venue. Amendment VI, Constitution of the United States.

They understood all too clearly that with the passage of time, memories dull, witnesses become unavailable, and meaningful defense becomes impossible.

Their guarantee to the citizenry, is deemed by the Court of Appeals to mean only that the accusation must be made

sometime within *five years* after the offense. Subject to that one qualification, the opinion holds, a defendant will learn of the necessity that he defend himself, only at the government's convenience.

A defendant has no right to prepare a defense, until the government has had time to "prepare [the case] for prosecution"—whether the time is needed or not, whether preparation is in fact made or not, whether or not the accused is injured by failure to have timely notice of the charge.

We think that the authors of the Constitution, would have been shocked by the suggestion that they had left such a loophole.

Neither the authorities cited by the Court of Appeals, nor that Court's own reasoning, supports the conclusion reached below.

The opinion cites *Beavers* v. *Haubert,* 198 U.S. 77, 87, for the proposition that a determination whether a speedy trial has been denied, ". . . depends upon circumstances." But that citation is completely at odds with the lower Court's conclusion that the determination *does not* depend upon circumstances. According to the Court of Appeals, a delay of five years means a speedy trial; a delay of one day more than that is technically illegal, although not unfair. *Nothing* is unfair. "Circumstances" in the view of the Court below, are immaterial. The issue is decided (Court's emphasis) "*only* by the statute of limitations."

Nor does Mr. Justice White's opinion in *United States* v. *Ewell,* 383 U.S. 116, 120, support the result reached below. As is clear from the language quoted by the Court of Appeals, *Ewell* dealt with a normal delay between arrest and hearing. The defendants in *Ewell* knew, during the period

of delay, that preparation for defense was necessary. Petitioner on the other hand was not alerted, by arrest or otherwise.

The Court below excuses the delay, on the grounds that "... the government is entitled to a reasonable time in which to investigate ... and prepare ..." But there is *nothing* to indicate that the government did, or tried to do, any such thing. And if the government is not required to justify delays in prosecution—if it holds the *carte blanche* awarded by the opinion below—it is necessarily "entitled" to any delay, no matter how unreasonable or prejudicial, even if the delay is deliberately designed to impede defense against the secret accusation, "limited *only* by the statute of limitations."

Granted that the indictment was returned within the period provided by the statute of limitations. But that is not the sole test. The question is whether the government is guilty of an unwarranted delay which worked to the defendant's disadvantage. Granted that the government was entitled to a reasonable opportunity to investigate Lacinak's statements; but as far as the record shows, Lacinak's statements were *not* significantly investigated. And in any event, the government's right to investigate is subordinate to the defendant's right to be able to make a meaningful defense. Fourteen months is more than a reasonable time, particularly when three years' delay precedes the commencement of the investigation. And if the defendant has been denied a constitutional right, it is meaningless to contend that that loss was occasioned by the exercise of the government's right to investigate.

In its consideration of *Ross* v. *United States,* D.C. Cir. 1965, 349 F.2d 210, the opinion below cites a series of facts which, in the lower Court's view distinguish *Ross* from the

case at bar. And indeed, we fully agree. To compare the *Ross* criteria with the facts of the case at bar,

ROSS	CASE AT BAR
1. "A purposeful delay of seven months between offense and arrest."	1. A deliberate but purposeless delay of *fourteen* months, joined to an earlier delay of three years, between offense and arrest.
2. "A plausible claim of inability to recall or reconstruct the events of the day of the offense."	2. An obviously truthful claim of inability to recall or reconstruct the events of an *unspecified* date of offense, coupled with the intervening death of the only other witness.
3. "A trial in which the case against appellant consists of the recollection of one witness refreshed by a notebook."	3. A trial in which the case against Petitioner consisted of the hazy recollection of a witness who could recall dates only to the nearest month, and who did not even have a notebook.

Distinctions? Assuredly.

But all distinctions between the two cases, work in favor of the Petitioners. In *Ross,* the total time between the offense and the accusation was seven months; in the case at bar about *fifty* months elapsed. In *Ross* the accusation was deferred seven months after the authorities learned of the offense; in the case at bar, the delay was more than twice that. In *Ross,* a government agent was the witness to the offense; in the case at bar, the accuser must by any standard be deemed substantially less credible than the officer in *Ross.* In *Ross,* the delay was occasioned by the

[3]A consideration of the distinctions between the two cases, would seem unnecessary in view of the recitation of the opinion that the statute of limitations is the sole determinant. If that is the case, "circumstances" are unimportant; *Ross* is simply in error.

fact that the agent was an undercover investigator, the effectiveness of whose continued work required that the bringing of charges be delayed until the completion of his undercover work (349 F. 2nd 212). In the case at bar, there is no suggestion of justification for delay.

Necessarily, and as Petitioner testified, the delay in advising him of the charge impaired his ability to recall the specifics of his activities during September of 1960. Exculpatory matters may or may not have been available. It is in the very nature of the dulling of memory with the passage of time, that one may well be unable to recall events that are significant only in view of subsequent developments. It is an obvious absurdity to ask the Petitioners to show just what it was that he forgot. Such a requirement would mean that no complaint of unreasonable delay would ever be tenable. And the Court of Appeals means exactly that, by the clear language of its opinion.

But if specifics be needed, it is sufficient to show that Mendola, a possible exculpatory witness, died before trial. He died *after* Lacinak had accused Petitioner. He died *before* Petitioner was informed of the accusation. And with him died the only possible exculpatory occurrence witness.

The damage caused by the government's delay, can never be repaired.

Of course, such considerations are unimportant, if the only measure of timeliness is the statute of limitations. But we cannot believe that such is the correct rule. It is too obviously unjust. We pray that your Honors will act to assure that it does not become the law.

IV.

THE DENIAL OF A FAIR TRIAL.

A conviction based upon evidence of the caliber shown by the record of this case, can be the product of many different things.

The most likely factors in such cases, are bias, notoriety, and passion. All are present here.

A.

A lack of care in jury selection, intensified the prejudice caused by pre-trial publicity.

> "The term 'fair trial' is often used, but not often defined. * * * It consists not only in an observance of the naked forms of law, but in a recognition and just appreciation of its principles. . . . It means a trial before an impartial judge, an impartial jury. . . . Being impartial means being indifferent as between the parties." *Sunderland* v. *United States,* 8 Cir., 19 F.2d 202, 216 (1927).

With that as our standard, we urge that the defendant did not have a fair trial.

On August 6, 1965, Life Magazine, a very well known periodical, took a very unusual step in devoting a six-page article, together with cartoons, to a stylized version of the supposed career of Petitioner and his brothers. The tone of the article was that Petitioner had been guilty of a lengthy series of depredations over a number of years, and abetted by unskilled prosecutors, overly credulous jurors, and sharp defense lawyers, had made a complete mockery of justice over that entire period. The tone of the article could be regarded as quite humorous if Petitioner had not had a trial pending. In view of the pendency of that

trial, the only appropriate word is vicious. (See Motion and Exhibit filed September 13, 1965).

In advance of the publication of that article, one leading Chicago newspaper presented, through its feature columnist, an article drawing attention to the upcoming spread in Life Magazine, and listing the social ills of Chicago as "bodies in trunks, slums, trouble, Tony Accardo, restaurant bombings, pollution of Lake Michigan, crooked lobbyists, traffic jams, and people like the Panczko brothers".

On September 13, 1965—the earliest possible date in the circumstances[4]—Petitioner moved to delay the trial because of that adverse publicity. In the meantime, the August 27 issue of Life Magazine presented still further references to the matter (Tr. 9/13/65, p. 2).

The prosecutor objected to the delay because "all of these things can be cured on your voir dire examination". The court agreed with the prosecutor, and denied the motion. (Tr. 9/13/65, p. 3). The court stated that "even Panczko" can get a fair trial, and continued: "We will attempt to insure that he does, and that he does secure that kind of a trial, and by the proper voir dire where you will have a chance to question people".[5]

In upholding that action, the Court of Appeals notes that Petitioner did not move for a transfer to a different district. The relevance of that fact, is far from obvious.

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[4] See page 7 of motion.

[5] The defense suggested that the jurors would be unlikely to trust even defendant's lawyers because the article had suggested that any lawyers representing defendant were "loophole lawyers . . . making fools of the public and justice in general". That was deemed irrelevant because, as the prosecutor observed, "attorneys are not on trial in this case". (Tr. 9/13/65 pp. 3-4).

Petitioner cannot readily suggest the identity of a district in which Life Magazine is not circulated. And a denial of a mere postponement of trial, is a ruling which is totally inconsistent with the grant of the much more drastic venue transfer.

The Court of Appeals also recites that Petitioner did not represent that publicity from the Life article had "so permeated the territory . . . as to prevent selection of an impartial jury . . ." But that is almost exactly what Petitioner alleged. He proved it, within the restrictive limits of the trial court's exploration of the issue.

And the jury was *not* impartial. Some of them said so.

But the jury was impaneled anyway. That, largely because the trial judge on two occasions promised the defense, outside the jury's presence, proper protective action—and then broke those promises while the prospective jurors were present.

Petitioner's trial commenced October 25, 1965. His principal counsel, a member of the Florida bar, commenced the trial alone, as required by the trial court, while local junior counsel was briefly engaged elsewhere.

At the outset, counsel again moved for delay on the grounds of prejudicial publicity. That motion was denied. (Partial Tr. 10/25/65, p. 2). Defense counsel then made the very modest request that in view of the nature of the publicity, the jurors be interrogated singly so that none would be affected by any answer that might be given by any of the other members of the panel. The court denied that motion, but stated that he would not permit any juror to express an opinion or state anything he might have heard. "I am going to stop the interrogation before it gets that far." (Partial Tr. 10/25/65 pp. 6-7).

The court then said that the jurors would be taken four at a time, but with all other jurors present (p. 9). Defense counsel requested that the jurors be interrogated in insulated panels of four. The government had no objection to that procedure. Notwithstanding that, the court refused to do it, and proposed the following remedy: "I am going to tell the jury specifically that if any will answer the question yes, I am not going to pursue the subject any further except to find out whether or not, as a result of that, have they any opinion".

The court inquired whether there were any other specific questions that defense counsel wished the court to put to the jurors. Defense counsel must necessarily have recalled the court's promise, made on September 13, that every possible step would be taken to assure freedom from prejudice, including a "proper voir dire where you will have a chance to question people". (Tr. 9/13/65 p. 4). The court stated that he would cover "the general questions that apply in all criminal cases" and defense counsel stated he had no other questions that he wanted the court to put.

The court then proceeded to tell all the prospective jurors what the case was about, and that Petitioner was presumed innocent. The court then interrogated twelve jurors on very general issues. It is quite obvious that defense counsel, especially in view of his status as a stranger in the jurisdiction, could not possibly have imagined that this was anything more than a very general preliminary qualification of the jurors, especially in view of the court's earlier ruling that the jurors would be qualified in panels of four.

Of the first twelve veniremen, it appeared that three (Jenkins, p. 18, Mason, p. 27, Uftring, p. 44) had heard

or read of Petitioner. Four others had not. As to the remaining five, the question of publicity was unresolved.[6]

At the end of that procedure, the defense was asked whether it had any general questions of the entire panel. Mr. Varon, defense counsel from Florida, still in the absence of his local associate, replied "I assume, your Honor, we will have an opportunity to interrogate the panel". The judge replied, "through me".

Very shortly thereafter, local counsel arrived, his other engagement having been completed. The trial court asked for "specific questions". Defense counsel again inquired whether he might interrogate the jurors (p. 50). He was told he could do so only through the court; that he should advise the court of the name of the juror and the question to be put, and the court would then put the question. Defense counsel acknowledged that he understood the procedure, and the court then volunteered an additional caveat: "If it is a proper question".

The first juror in the box, Jenkins, had stated that he had heard of Petitioner through newspapers. Defense counsel asked how recently he had heard of Petitioner. Jenkins' answer was as follows: "Well, I have been in Chicago six years and I think it has been before me in the newspaper for the six years I have been here." The

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[6] Venireman Niehoff was not asked the question (p. 38-40). Venireman Haut recognized the name, but thought it was one of Petitioner's relatives (p. 34). Venireman Gordon was asked only if he was "familiar with the defendant in any way." (p. 25). Venireman Ianson gave a negative answer to the question "do you know anything about any of the parties who are involved here, parties or attorneys?" (p. 31). And venireman Kowalkowski was asked by the court only if she had heard about the case on trial or knew any of the parties (p. 43).

court expressed considerable satisfaction: "Go right ahead, I mean do you have any other question?" (p. 60). Defense moved for mistrial; the motion was denied.

We would remind your Honors that this happened in the face of the court's assurance, previously given, that every effort would be made to assure that the jury would be insulated from any effect of prejudicial publicity; in the face of the judge's assurance that no juror would be permitted to volunteer prejudicial matter; and in consequence of the court's refusal, without reason, to interrogate jurors singly, or even in insulated panels, although it was clear that pre-trial publicity would make it extremely difficult at best to obtain an uncontaminated jury.

It is, we suppose, common ground that if the court or the prosecutor had advised the jury that Petitioner had been the subject of extensive publicity for six years, a mistrial would have been a matter of course. And we urge to your Honors that the answer here quoted, coming from a fellow venireman, must have carried considerably greater weight with the remaining jurors than would have been the case if the jurors had heard the same offending material from any other source.

From the time the question was first raised, it is clear that the court was aware that the defense was faced with the Hobson's choice of ignoring the question of publicity, or compounding the prejudice by directing the jurors' attention to it on voir dire. The trial court, in the face of numerous reasonable requests, did absolutely nothing to ameliorate that predicament, and fairly can be said to have worsened it.

By the time the jury selection was completed, the defense had exhausted all of its challenges. Of the 26 jurors interrogated, 11 had seen or heard publicity concerning the defendant, 11 had not, and the issue was uncertain as to 4 of them.

Of the 12 jurors finally selected after all defense challenges had been exhausted, no less than 3 had heard or seen publicity concerning the defendant.[7]

Another worked for the Treasury Department and had suggested that as a reason why she might not act as a fair juror; but the trial judge simply directed the juror that it would make no difference (Partial Tr. 10/25/65, p. 109-113); and the juror finally agreed that "it's just that I had pleasant memories working in the Treasury Department . . . ."

Obviously, this was a juror whom no defense lawyer, given a reasonable opportunity to exercise peremptory challenges *without* the intrusion of the publicity factor, would have accepted. Defense counsel attempted further questioning, but the jury was more than restrictive; he directly led the juror, with such questioning as "That isn't going to affect your judgment, is it?" (Partial Tr. 10/25/66 p. 111). At that point, defense had no peremptory challenges left.

As soon as the judge had declared the jury complete, the defense moved for disqualification of the panel and for mistrial on the grounds that the panel had been contaminated by the publicity (Tr. 3). Objection was further registered to the refusal to permit defense counsel to interrogate the jurors as had previously been promised; this was likewise denied (Tr. 4).

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[7] Jurors Lesak (Tr. 68), Thurbush (Tr. 104), Mason (Tr. 29).

We think these points are particularly significant because the trial judge overruled the motion for new trial on the bases of two factual mistakes.

The first of these was that the court's impression that nobody on the panel finally selected had seen pretrial publicity concerning the defendant (Tr. 12/3/65 p. 6). In fact, three of them had; and of course, all of them had heard venireman Jenkin's volunteered assertion that Petitioner had been the subject of newspaper publicity for six years.

Secondly, the trial court overruled the motion for new trial because, the court said, the defense had expressed itself satisfied with the jury it finally selected (Tr. 12/3/65 p. 7). No fact proposition could be more in error than that.

As the transcript will show, defense counsel attempted to advise the court that it was proceeding under an erroneous factual premise; but the court ignored counsel's claim.

The Court of Appeals has proceeded on no more sound a basis. It is influenced by the thought that "ordinarily such a decision [denying a continuance] is not reviewable . . ." But that principle applies only to *interlocutory* review, or if the motion is not renewed at the trial. There is no rule that an appellant may not claim prejudice through denial of a continuance. Obviously, no such rule could exist, consistent with the right to appeal on grounds of prejudicial publicity.

To this moment, no tribunal has given reasonable consideration to Petitioner's claim of prejudice.

B.

The accusation of murder caused the defendant irretrievable prejudice.

> "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. . . . (S)uch duty is not to be discharged as a matter of rote, but with sound and advised discretion . . . and with a caution increasing in degree as the offenses dealt with increase in gravity.' " (*Glasser* v. *United States,* 315 U.S. 60, 71.

There are certain things which, if said to a jury, will deflect them hopelessly from impartial consideration of the evidence. *United States* v. *Levi,* 7 Cir., 177 F.2d 827, 830 (1949). A tearful accusation by an aged, infirm and bereaved father, speaking from a wheelchair, that the defendant is responsible for the murder of his son, is one of those things.

Especially where the defendant has no meaningful opportunity to deny the charge, such an accusation is fatal to all possibility of a fair trial.

It is barely possible, in theory, that the reaction of a court may be sufficiently prompt, vigorous, and indignant to remove much or all of the resulting prejudice. This court need not pause to consider that possibility. We have no such situation here.

Gaetano Mendolia, age 73, was brought to court in a wheelchair. He was the father of Guy Mendola, described within the indictment as a deceased co-conspirator. The prosecutors said that he had previously made certain statements that he had seen the defendant in certain places, but then stated that he did not want to testify. "The subpoena was served upon him and this individual had then admitted

himself to Hines Hospital." (R. 343). The government expressed apprehension at calling Mendolia because of his unwillingness to testify, and asked that he be called as a court witness. The prosecutors, who had spoken to Mendolia shortly before trial (R. 345), expressed surprise that he had come to court in a wheelchair (R. 343).

The court refused to require the prosecution to disclose the evidence expected from Mendolia or the statements by him. Instead, outside the presence of the jury, the court conducted a preliminary questioning of the witness.

The court's questioning of the witness was limited to establishing that the witness was 73 years old and the father of Guy Mendola. The court continued:

"Q. And your son is now deceased, is that right?
A. What?
Q. He died some time ago?
A. They killed him.
Q. How long ago did that happen?
A. August 31, 1965.[8]
Q. 1965?
A. Yes." (R. 349).

The court thereupon inquired whether the witness had spoken to the prosecutors, and the witness said that he had told them that he knew the Petitioner. He identified a photograph of the Petitioner. The court asked whether there was any reason why the witness did not want to testify, and the witness said that he had no reason not to; the only thing he knew was that he had seen the defendant near his house. The court asked if anyone had attempted to dissuade the witness from testifying, and the witness said no.

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[8] 1964 was the correct year. (A. 1).

The court directed the jury proceedings to resume. However, the prosecutor pointed out that under the court's questioning, the witness had mentioned the death of his son, and that the government did not propose to elicit any such evidence. The court responded: "No, I am not going to go into that. We are not going to talk about the death of your son. We won't talk about that. All right." The witness responded, "My son got killed". The court said, "Well, we don't mention that. Don't talk about this. Bring in the jury". (A. 33).

As soon as the jury had returned, the prosecutor asked that "the record reflect that the witness is unable to take the stand because he is confined to a wheelchair". That, notwithstanding the fact that the witness had said, immediately before the jury returned, "it is all right" when asked whether he could take the witness stand. That, notwithstanding the prosecutor's expressed reservations concerning the genuineness of the witness' incapacity.

Under direct examination, the witness identified a photograph of his home (A. 34) and a photograph of Lacinak (A. 34). The witness further said that in 1960 or 1961—"I don't remember exactly"—he saw Lacinak alone with the defendant (A. 34).

On further questioning, the witness said he did not see the defendant in the courtroom—"maybe my eyes, I couldn't see". (A. 34). He had known the defendant several years (A. 34), had seen him "maybe more than five" times over that period (A. 34-35).

For no apparent purpose, the prosecutor thereupon inquired: "When was the last time you saw Paul Panczko?" The witness responded: "When they told me 'Your son is in Florida. He is going to get killed.' That is what they told me." (A. 35).

As defense counsel sought to interrupt, the prosecutor persisted:

"Q. Just answer the question, please.
A. That is what they said.
Q. Wait, Mr. Mendolia, please. The question is when did you last see Paul Panczko?
Mr. Varon (defense counsel): If your Honor please.
The Witness: The last time I see when the—
Q. The prosecutor) All right. Forget that Mr. Mendolia." (A. 35).

Defense counsel thereupon asked that the jury be excused. The court refused the request. "I will permit you to cross-examine the witness, and then we will discuss the other matter." (A. 35). The court further ruled that any objection would be considered made as of that time. (A. 35). The prosecutor then proceeded to prove again through the witness that Paul Panczko was also known as Peanuts (A. 35).

For the remainder of his examination, the witness received unusually solicitous and sympathetic handling from the court. Although the witness said he had seen Lacinak only once (A. 36), and that once, unequivocally, in the presence of the petitioner and no one else (A. 34), the government was permitted to lead the witness into a showing that Lacinak had a wife and "I think" a baby (A. 36). Defense objection that the witness was being led met with the court's agreement in principle, "but under the circumstances, I am going to permit him to do it to this extent. I agree it is leading". (A. 36). The defense further objected that the testimony was unaccompanied by any qualifying matter as to dates. The court helpfully observed, without any foundation, "I understood this was some time in September of 1960, wasn't it?" (A. 36) The

witness did not answer. In the circumstances, it may properly be suggested that he did not have to. (*Cf. United States* v. *Hill*, 7 Cir., 332 F.2d 105, 106 (1964).

When the jury was finally excused, defense motion for mistrial was denied. The court offered to instruct the jury to disregard the offending reference, but defense counsel stated that they did not think such an admonition could be effective (A. 37). The prosecutor pointed out: "I certainly tried when I knew the answer was coming out to prevent it from being said." The court stated: "Well, I am going to instruct the jury and I will do what I can to eliminate this from their thinking. I think I can do it." (A. 38). The defense, however, adhered to its request for mistrial. (A. 39).

The jury was then recalled, and the court advised them that the defense had objected "to certain evidence given by the last witness and particularly with reference to *any conversations this witness may have had with the defendant*". The court continued that he had "sustained the objection of the defense to the alleged *conversation* that took place according to the witness between himself and the defendant". The jury were instructed to "erase from their minds and disregard entirely any statements . . . relating to *any such conversation.*" The court concluded: "The balance of his testimony you may consider for whatever worth you may give it. But the statement, and keep in mind, is the statement he made with reference to *an alleged conversation with the defendant.* The evidence has been stricken and you should entirely disregard it . . ." (A. 40; emphasis supplied)

It was obvious that the court compounded rather than ameliorated the errors, to the prejudice of petitioner. For Mendolia had *not* said that he had had a conversation

with petitioner. He had said that the last time he had *seen* petitioner was "When they told me, 'Your son is in Florida. He is going to get killed'. That is what they told me." (A. 35) He did not directly say that the petitioner had participated in that conversation, or even heard it. The court had now driven home the last nail, if one were needed.

Defense again moved for a mistrial (A. 40-41) pointing out that the court's reference to a conversation with the petitioner was not in fact justified. (A. 41, R. 388). The court asked the reporter for the precise words used—"I don't want to have any misinterpretation . . ." The record was presented, and the exact question and answer was typed up for the court (A. 41; R. 391). When this was done, the defense again pointed out to the court that there had been, but for the court's statement, no basis for the jury to conclude that the death threat to Mendola had been voiced by petitioner. The defense again moved for a mistrial. The court refused to alter its position, stating, "This is as far as I can go. I can't go any further". (A. 42).

The next morning, however, without further preliminaries or motions, the court again directed the jury's attention to the offending material. He reminded them that they had been asked to disregard "certain evidence" and proceeded again to compound the prejudice to petitioner:

> "This witness in answer to a question which was addressed to him which stated 'When was the last time you saw Paul Panczko?' and *he gave an answer that you will recall* as having been given yesterday afternoon . . . now the answer to that question is the answer that I ordered stricken from the record, and *you will recall the answer that was made at the time.*

"In referring to the conversation that I asked you to disregard, I said something to the effect that there was a conversation between the witness and defendant Panczko.

"I have rechecked the record carefully myself this morning and the record shows no reference to a conversation between the defendant and the witness who was on the stand here yesterday. The word 'they' was used and there was no reference made to a conversation between the defendant and the witness. I want you to disregard the answer that was actually made and the answer did not refer to a conversation between the witness and the defendant.

"Now, with that in mind, I am sure that will clear up any misconception that may exist." (A. 45-46).

The court "cleared up any misconception" by advising the jury that:

1. He had previously told them that he had stricken from the record matter relating to a conversation between Mendolia and petitioner.

2. He had rechecked the record this morning and found no such reference. (That might not be the least bit surprising in a juror's view, since the judge had ordered it "stricken from the record").

3. The jury "will recall" the answer.

4. The jury should disregard the answer; and

5. The answer did not say that there had been a conversation between petitioner and the witness.

It is unrealistic to ask your Honors to conjecture what the jury must have concluded at that point. But at a basic minimum the attention of the jury was again directed to the situation in highly equivocal terms. We do not believe

that anyone can conscientiously contend that the jury's verdict was not in some degree the product of those statements.[9]

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[9] Implicit in the indictment's reference to "Guy Mendola, now deceased" (A. 1), and explicit in the Mendolia testimony (A. 35), is the gratuitous but sinister suggestion that appellant may have been implicated in Mendola's death.

A much more tenable assertion would be that the prosecution cynically uses Mendola's corpse for the purpose of generating prejudice against its adversaries in litigation. Mendola is quite valuable to the government in death. Never has a demise been attributed to so many independent and disparate causes.

At various times, the following suggestions have been made by various official sources, relative to Mendola's death:

(a) On April 15, 1966, Mendola was called upon for another posthumous service of the type which he performed so well in the case at bar. For on that date, indictment number 66 CR 247 was returned in the Northern District of Illinois, Eastern Division, charging 18 defendants, none of whom had any connection with this case, with a hijacking conspiracy. An unindicted co-conspirator is "Guy Mendola, now deceased." We think it a reasonable prediction that Mendola will be called upon to serve the same necrophilic function in that case, as in this one.

The first pre-trial publicity salvo appeared in Chicago Sun-Times of April 20, 1966 (the indictment had been earlier suppressed.) In relevant part, it recites:

"The Cosa Nostra control of the master hijackers was revealed, the government prosecutors said, by these FBI discoveries: * * *

"Two members of the hijacking gang were murdered, government sources said, for breaking the rules imposed by the gangsters. The murder victims were Guy Mendola, slain in 1964 . . .

* * * *

"Mendola's slaying is blamed on his refusal to ante up for a defense fund for other members of the hijacking gang involved in the $250,000 burglary of the Zahn Drug Co. in 1964."

The tremendous disparity between the probative value of the testimony of Mendolia on the one hand, and its dramatic emphasis on the other, serves strongly to reinforce the defense position. Mendolia's only contribution

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That is rather a far cry from counterfeiting, but the exoneration comes too late to help petitioner in the eyes of the jury that tried him.

(b) On January 7, 1966, the Chicago Sun-Times published an interview given by government informant Fred Ackerman, then in "protective custody" while "his leads . . . are being investigated by federal prosecutors, police, and agents of the [crime] commission." Ackerman stated in that interview that Mendola was killed by a former suburban policeman because of "juice" (usury) involvements.

(c) On September 1, 1964, the Chicago Tribune disclosed the arrest and suspected involvement in Mendola's death, of one Pranno, who had beaten Mendola three months before in a dispute over money from pin ball routes in Kane County.

(d) On the same day, Chicago's American quoted "a high law enforcement source" as follows: "Guy [Lover Boy] Mendola was executed by west suburban crime syndicate gambling interests because he had turned informer for the internal revenue service."

(e) On November 18, 1965, the Chicago Sun-Times published an interview given by informant Vito Zaccagnini, then in government custody. Zaccagnini was the principal government witness in U. S. v. D'Antonio, et al., petition for certiorari recently denied in this Court. In that interview, Zaccagnini stated that Mendola had been killed by his confederates in the Zahn Drug Company burglary.

(f) In a case presently pending in the Appellate Court of Illinois, First District, People v. Anthony Gallas and Anthony Di Donato, No. 50921, an appeal from a conviction based on defendants' possession of 4 stolen TV sets, one of the claimed errors is the irrelevant reference by the prosecutor in closing argument to the shot-gun death of Guy Mendola.

was to say that he had once seen Lacinak and Panczko together, at a time when young Mendola was not present. This is in itself somewhat remarkable because Lacinak had not testified that he had ever seen Panczko *except* in young Mendola's presence.

As against that, must be weighed the fact that although the prosecutors had told the judge that they believed Mendolia's hospital confinement was a method of avoiding the subpoena, and although Mendolia had expressed ability and willingness to take the witness stand, the prosecutors told the jury that Mendolia had to testify from a wheelchair because of illness. In examining Mendolia outside the presence of the jury, the trial judge had dwelt somewhat on the death of Mendolia's son. His subsequent admonition, at the prompting of the prosecutor, that "we won't talk about that" could hardly have been regarded as assurance against what ultimately happened—particularly since the court told the witness only that it was the actual death of his son which "we won't talk about".

It remains unexplained to this very day why the prosecutors asked Mendolia when he last saw the defendant, or what they hoped legitimately to elicit by that question.

There can be no doubt that this was the high point of the trial.

The trial judge did not react when the offending material was uttered. Any objection, he ruled, should be made later. And the deference which the court showed to the witness thereafter, the gentleness with which he was treated, and the judicial salvage of the witness's testimony by reference to a date to which the witness had not testified, certainly did nothing to impress the jury with the proposition that the statement was not merely inadmis-

sible, but something which must not influence them in any way. Ultimately, and anticlimactically, the jury was informed that the reference was stricken only because the defense had objected to it.

The whole thing was treated as the type of affair the layman refers to as a "technicality". The jury were ultimately told, not that the court regretted the mention of the offending material, but that the defense had objected and the objection, after deliberation, had been sustained (A. 40).

All that is a very far cry from what would be necessary in the theoretical case in which, conceivably, the prejudicial effect of such matter might be mitigated by prompt, vigorous and effective judicial action.

If there were none other, this claimed error should suffice for reversal.

The Court of Appeals makes light of the episode because it "was not attributable to anyone." But Mendolia could hardly have done more damage to Petitioner if (as we do not believe) he had been carefully coached by the prosecution. With one spurious thrust, Mendolia implicated Petitioner in a murder and excused, in the jury's eyes, the government's failure to accuse Petitioner during Mendola's lifetime.

The Court of Appeals further guesses—and that is the only proper word—that the jury paid close attention to Mendolia's "responsive" testimony, while disregarding his "nonresponsive answers" caused by "the emotional impact."

That argument, respectfully, proceeds from conclusion to premise. There was no "emotional impact" on Mendolia,

except that generated by the trial court's irrelevant questions concerning his son (R. 349).

But there was certainly an "emotional impact" on the jury. It was just as they had known all along, just as the journalists had said: Petitioner was a bad man, and should be put away.

From Petitioner's standpoint, as from the standpoint of any defendant, it was immaterial whether the outburst was "attributable" to anyone.

One does not have to be an official of the court, in order to deny a defendant a fair trial.

CONCLUSION

On a nebulous charge, and on farcical evidence, after a trial studded with error, Petitioner was severely punished.

In affirming that conviction, the Court of Appeals has opened the way to denial of the few safeguards remaining to a defendant in a conspiracy prosecution, and has turned a deaf ear to contentions of Constitutional dimensions.

We pray that your Honors will consider this case worthy of review.

Respectfully submitted,

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